81-2151

No.

Supreme Court, U.S.
FILED
MAY 21 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PETROCHEMICAL ENERGY GROUP,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

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May 21, 1982

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QUESTIONS PRESENTED

1. Whether the court of appeals erred by finding that the legislative review provision in Subsection 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(c), is severable from the remainder of Section 202 of that Act.

2. Whether the court of appeals erred by finding the Federal Energy Regulatory Commission's revocation of the rule it had announced in its Order No. 80, which rule the United States House of Representatives had previously disapproved pursuant to the legislative review provision of Subsection 202(c) of the Natural Gas Policy Act of 1978, was procedurally invalid under the Administrative Procedure Act, 5 U.S.C. § 553(b) and (c).

3. Whether the court of appeals erred by ordering that Order No. 80 was to be placed into effect, subject to Commission action to the contrary, inasmuch as Order No. 80 was arbitrary and capricious, an abuse of the Commission's discretion and unsupported by substantial evidence.

PARTIES BELOW *

Appellants in this case, all of whom participated in the case below are:

Petrochemical Energy Group
Process Gas Consumers Group
American Gas Association
Georgia Industrial Gas Group
American Iron and Steel Institute
Interstate Natural Gas Association of America
United Distribution Companies
Federal Energy Regulatory Commission

In addition, the other parties below were:

Consumer Energy Council of America
Consumer Federation of America
Public Citizen
The United States Senate (Amicus)
The United States House of Representatives (Amicus)
The United States of America (Amicus)

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* The Petrochemical Energy Group consists of the following companies: Borden Chemical; Borg-Warner Chemicals; Celanese Corporation; Chemplex Company; The Dow Chemical Company; The Firestone Tire & Rubber Company; The B.F. Goodrich Company; The Goodyear Tire & Rubber Company; Hercules Incorporated; Monsanto Company; National Distillers & Chemical Corp.; Olin Corporation; PPG Industries, Inc.; Rohm and Haas Company; Texas Eastman Company, Division of Eastman Kodak Company; and Union Carbide Corporation. At the time that PEG intervened in this case in the court of appeals, E. I. du Pont de Nemours & Co., Inc.; Georgia-Pacific Corporation; and Publicker Industries, Inc. were also members.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	3
THE QUESTIONS ARE SUBSTANTIAL	6
1. The Court Of Appeals Erred In Holding Subsection 202(c) Severable From The Remainder Of Section 202	6
2. Even If Subsection 202(c) Is Severable, The Court Of Appeals Erred In Holding Invalid FERC's Revocation Of Order No. 80	7
3. Order No. 80 Is Invalid Because It Is Not The Product Of Reasoned Rulemaking	9
4. The Issues In This Case Require Plenary Consideration	9
CONCLUSION	10
APPENDIX (as submitted by the Process Gas Consumers Group *et al.* in No. 81-2008)	1a

TABLE OF AUTHORITIES

Cases

Page

Carter v. Carter Coal Company, 298 U.S. 238 (1936) 7

New York Transit Authority v. Beazer, 440 U.S. 568 (1979).. 6

Sloan v. Lemon, 413 U.S. 825 (1973) 7

Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944).. 6

Statutes

Administrative Procedure Act
5 U.S.C. § 553 ..... 5, 8

Natural Gas Policy Act of 1978
Section 201, 15 U.S.C. § 3341 ..... 3, 4
Section 202, 15 U.S.C. § 3342 ..... *passim*
Section 506, 15 U.S.C. § 3416 8

Administrative Authorities and Regulations

18 C.F.R. Part 282 (1980) 3

Other Sources

"Incremental Pricing of Natural Gas", H.R. Rep. No. 96-938, 96th Cong., 2d Sess. (May 12, 1980) 4

H.R. Res. 655, 96th Cong., 2d Sess., 126 Cong. Rec. H 3855 (daily ed. May 20, 1980) 4

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v.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

INTRODUCTION

The Petrochemical Energy Group (PEG) hereby submits its Jurisdictional Statement pursuant to Rules 12 and 15 of the Rules of the Supreme Court in the above-referenced action. PEG appeals from the final judgment, dated January 29, 1982, of the United States Court of Appeals for the District of Columbia Circuit, holding unconstitutional the legislative review provision in Subsection 202(c) of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3342(c), and ordering Order No. 80 of the Federal Energy Regulatory Commission (FERC) reinstated subject to reconsideration by FERC.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit in *Consumer Energy Council of America et al.* v. *Federal Energy Regulatory Commission,* Nos. 80-2184 and 80-2312 is not yet reported.

A copy of the slip opinion is set out in the Appendix at pp. 1a-104a.[1] The court's denial of rehearing, dated March 10, 1982, appears at p. 210a of the Appendix.

FERC Order No. 80 issued May 6, 1980 is published in 45 Fed. Reg. 31622 (May 13, 1980) and is set out at pp. 123a-195a of the Appendix. FERC's orders denying rehearing of Order No. 80, issued on August 1 and October 2, 1980, appear in the Appendix at pp. 196a-203a and 204a-207a, respectively.

JURISDICTION

The judgment of the court of appeals, which appears at pp. 208a-209a of the Appendix, was entered on January 29, 1982. A petition for rehearing was filed by The American Gas Association on February 26, 1982. The court of appeals denied this petition on March 10, 1982. The order denying rehearing is at p. 210a of the Appendix.

The jurisdiction of this Court arises under 28 U.S.C. § 1252 because the judgment of the court of appeals held unconstitutional 15 U.S.C. § 3342(c), a portion of an Act of Congress of the United States of America. Pursuant to that statutory authority and pursuant to 28 U.S.C. § 2101 (a) and Rule 11.3 of the Rules of the Supreme Court, PEG filed a Notice of Appeal, a copy of which is attached at pp. 217a-218a, in the United States Court of Appeals for the District of Columbia on March 25, 1982. This appeal is being docketed in this Court within 60 days of the filing of the Notice of Appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute upon which the court of appeals' decision is based is the Natural Gas Policy Act of 1978 (NGPA),

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[1] All references to the Appendix are to the Appendix to the Jurisdictional Statement submitted April 29, 1982, by the Process Gas Consumers Group, et al., in a related case, No. 81-2008.

15 U.S.C. §§ 3301-3432, the relevant portions of which appear at pp. 224a-231a.

The provisions of the Constitution of the United States specifically involved are Article I, Sections 1, 7 and 8; Article II, Sections 1 and 3; and Article III, Sections 1 and 2. The relevant portions of these provisions are set out at pp. 222a-224a.

STATEMENT OF THE CASE

The instant case focuses on the constitutionality of the legislative review provision in Subsection 202(c) of the NGPA and the effectiveness of a rule disapproved, or "vetoed", by the House of Representatives pursuant to that Subsection and subsequently revoked by the Commission.

Title II of the NGPA established a natural gas pricing program under which a disproportionately greater share of certain costs of higher priced gas acquired by interstate pipelines is charged to certain industrial gas users, rather than to other gas users. Under the program (hereinafter referred to as incremental pricing), a two-stage process was undertaken to determine those industrial users of natural gas to be subject to higher (or incremental) prices.

Section 201 of the NGPA, 15 U.S.C. § 3341, covers the first part of the program. This Section *requires* the Commission to promulgate, within 12 months after enactment of the NGPA, a rule applying an incrementally higher gas price to non-exempt industrial boiler fuel customers of interstate pipelines.[2]

Section 202 of the NGPA, 15 U.S.C. § 3342, provides that the Commission consider within 18 months of enactment of the NGPA, an amendment to the incremental pricing program established under Section 201. In this second stage of the program FERC is empowered to select

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[2] *See* 18 C.F.R. Part 282 (1980).

additional categories of industrial gas users to be covered. According to Subsections 202(a)(2) and 202(c), however, any such amendment is to become effective only if neither House of Congress votes to disapprove the rule within 30 days of its submission to Congress.

On November 15, 1979, FERC initiated proceedings pursuant to Section 202 of the NGPA by issuing a Notice of Proposed Rulemaking in Docket No. RM80-10. Extensive hearings on the proposed rule were held at various locations across the country and public comments were received. On May 6, 1980, the Commission issued Order No. 80 proposing an amendment to its incremental pricing rules promulgated under Section 201. The proposed amendment was submitted to Congress on the same day.

A Resolution of Disapproval, House Resolution 655,[3] was introduced in the House of Representatives and referred to the House Committee on Interstate and Foreign Commerce. On May 12, 1980, the Committee submitted a report entitled *Incremental Pricing of Natural Gas*,[4] in which it recommended passage of House Resolution 655. The Resolution went to the House Floor on May 20, 1980 and was adopted that day by a vote of 369-34.[5]

On June 5, 1980, the Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (hereinafter collectively referred to as "CECA") petitioned FERC for rehearing of Order No. 80. The petition asked that the Order be made effective, even though FERC had made it contingent on Congressional approval under Section 202(c), on grounds that the House vote of disapproval and Section 202(c) are unconstitutional.

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[3] H.R. Res. 655, 96th Cong. 2d Sess., 126 Cong. Rec. H 3855 (daily ed. May 20, 1980), set forth at p. 222a.

[4] H.R. Rep. No. 96-938, 96th Cong., 2d Sess. (May 12, 1980), set forth at pp. 107a-195a.

[5] 126 Cong. Rec. H3855 (daily ed. May 20, 1980).

FERC denied this petition for rehearing and revoked Order No. 80. *See* pp. 196a-203a. Upon denial of rehearing of the revocation order, *see* pp. 204a-207a, CECA sought review of FERC's orders in the United States Court of Appeals for the District of Columbia Circuit.

PEG intervened in support of FERC before the court of appeals. PEG took no position with respect to the underlying constitutional issue raised by CECA. Instead, PEG argued that the court of appeals need not reach the constitutional issue raised by CECA because, regardless of its outcome, CECA could not be given the relief it seeks. First, PEG argued that Subsection 202(c) was not severable from the remainder of Section 202. Accordingly, even if CECA prevailed on the constitutional issue, the whole of Section 202 would necessarily fall with Subsection 202(c), depriving any amendment issued under Section 202 of its statutory predicate. Second, PEG asserted that Order No. 80 was of no legal effect even if Section 202(c) is severable because the order had been lawfully revoked by FERC. Finally, even if FERC's revocation is invalid, Order No. 80 itself is invalid because it is not the product of reasoned decision making.

On January 29, 1982, the court of appeals handed down its decision, holding unconstitutional Subsection 202(c) and the action of the House of Representatives in disapproving the rule issued in Order No. 80.

In reaching the constitutional question, the court necessarily resolved two preliminary issues. First, the court held that Subsection 202(c) was severable from the remainder of Section 202. Second, the court of appeals ruled that FERC's revocation of Order No. 80 was procedurally invalid under the Administrative Procedure Act, 5 U.S.C. §§ 553(b) and (c). The court of appeals declined to rule, however, on whether Order No. 80 itself was invalid. Accordingly, the court of appeals ordered Order No. 80 placed into effect, subject to reconsideration by FERC.

On February 26, 1982 PEG filed its Notice of Appeal to this Court. However, on the same day, a petition for rehearing was filed by another party to the proceeding below. The petition was denied on March 10, 1982, *see* p. 210a, and PEG refiled its Notice of Appeal to this Court on March 25, 1982. See pp. 217a-218a.

THE QUESTIONS ARE SUBSTANTIAL

PEG does not here either challenge or support the decision of the court of appeals regarding the constitutionality of the one-house legislative veto. Rather, it is PEG's position that the court of appeals, having sound alternative, non-constitutional grounds to resolve the case, need never have reached the constitutional issue.[6] However, in the event this Court first resolves the constitutional issue and affirms the court of appeals on that question, this Court should nevertheless reverse the court of appeals on the non-constitutional questions. If the Court finds the one-house veto unconstitutional in this case, resolution of these other questions becomes necessary in order to avoid substantial economic disruption to both consumers and suppliers of natural gas.

1. The court of appeals erred in holding Subsection 202(c) severable from the remainder of Section 202.

Even if the court of appeals is correct in holding the one-house veto provision of Subsection 202(c) unconstitutional, the court erred in finding that FERC retained authority under Section 202 to promulgate Order No. 80. Section 202 is an inseverable whole; it may not be partially struck down without doing violence to congressional intent. Accordingly, in the event that this Court upholds the court of appeals regarding the constitutional issue, all of Section 202 must be found invalid, depriving Order No. 80 of its statutory predicate.

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[6] Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944), quoted in New York Transit Authority v. Beazer, 440 U.S. 568, 582 (1979).

No severability clause exists in the NGPA. In the absence of such a clause, the presumption is against severability.[7] The express terms of the NGPA, as well as its legislative history, demonstrate that this presumption cannot be overcome in this case. Only the first stage of incremental pricing is mandatory. The ultimate decision regarding expansion of incremental pricing in the second stage was left to the discretion of Congress by means of the legislative veto provision in Subsection 202(c). If the court of appeals is correct in its conclusion that the veto provision is unconstitutional, the remainder of Section 202 must also be struck down in order to preserve congressional intent to withhold ultimate decision making responsibility from FERC. Since a finding that Section 202(c) is severable would result in "a program quite different from the one legislature actually adopted", this Court should reverse the court of appeals and invalidate the entire Section 202.[8]

2. Even if Subsection 202(c) is severable, the court of appeals erred in holding invalid FERC's revocation of Order No. 80.

Even if the court should uphold the court of appeals on the severability issue, Order No. 80 cannot be made effective. The court of appeals erred in finding invalid FERC's revocation of that Order.

The court of appeals found FERC's revocation order procedurally defective under the APA, 5 U.S.C. § 553(b) and (c), holding that prior to revocation, FERC should have afforded parties notice and an opportunity to comment on the revocation. Neither the NGPA nor the APA requires such action.

The revocation order was issued as part of FERC's order on rehearing of Order No. 80. Prior to revocation, the Order had never been made final and effective. It remained

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[7] *See,* Carter v. Carter Coal Company, 298 U.S. 238, 312 (1936).

[8] Sloan v. Lemon, 413 U.S. 825, 834 (1973).

subject to rehearing and, by the express terms of Subsection 202(a)(2) of the NGPA, could never become effective in the event it was disapproved by Congress. Accordingly, in revoking the Order, FERC was not repealing a final and effective rule. Nothing in the APA prohibits withdrawing a rule before it becomes final without prior notice and comment.

Moreover, in exercising its power to amend the incremental pricing rules pursuant to Section 202(a)(2), FERC revoked Order No. 80 upon the record developed during FERC's consideration of the amendment. All interested persons had notice of, and had an opportunity to present written and oral views on, the proposed amendment. Having concluded that the record would not support the proposal, FERC properly revoked it.

FERC's reliance on the earlier record in order to revoke the Rule, without an additional round of notice and comment, is specifically sanctioned by the NGPA and judicial precedent under the APA. In acting upon an application for rehearing, FERC is expressly empowered to grant or deny rehearing or modify the original order without further hearing, NGPA Section 506(a)(2), 15 U.S.C. § 3416 (a)(2). This authority is bottomed on the sound policy that FERC be permitted to rectify errors on its own before judicial intervention is sought.

Similar policy considerations demonstrate the propriety of FERC's actions under the APA. An agency is under no obligation to provide new opportunities to comment in the event it decides to modify a proposed rule based upon the record developed during a rulemaking proceeding. Under Section 202 FERC had discretion to propose those categories of industrial users to be subject to incremental pricing in addition to the industrial boiler fuel users covered by the first stage of the program. Interested parties had full notice that one option for comment was to include no additional categories of users, and many parties actually sub-

mitted views on the subject. A second round of comment on that option, therefore, was not required.

3. Order No. 80 is invalid because it is not the product of reasoned rulemaking.

If the Court affirms the court of appeals in finding both that Section 202(c) is severable from the remainder of Section 202 and that FERC's revocation of Order No. 80 is invalid, the Court should nevertheless set aside Order No. 80 itself as arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence in the record.

Believing that Congress had retained for itself the ultimate policy decision on whether an expansion of the incremental pricing program would be appropriate, FERC acknowledged that it had not considered all the arguments presented on the issue and thus had "not yet independently evaluated whether the phase two rule meets the social and economic goals of the Title II incremental pricing program."[9] This admitted failure to exercise reasoned decision making is a conclusive basis to invalidate Order No. 80. Accordingly, the Order should be held void *ab initio*.

4. The issues in this case require plenary consideration.

The issues discussed herein are important matters that should be resolved by this Court if it decides to uphold the court of appeals in finding unconstitutional the one-house veto exercised by the House of Representatives in this case.

Excising the Congressional veto power in this case necessarily raises the critical question of the scope of FERC's authority, if any, under Section 202 to expand the incremental pricing program to industrial non-boiler fuel users.

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[9] Order Denying Rehearing and Revoking Amendment Made by Order No. 80, at p. 199a.

The question of severability is of course essential to this inquiry. If Subsection 202(c) is inseverable from the remainder of Section 202, the Court need go no further because FERC's underlying statutory authority to issue Order No. 80 or any other rule would be removed. However, if Subsection 202(c) is found severable, the court's inquiry should not end.

The decision of the court of appeals would place Order No. 80 into effect, unless FERC acts to amend it. Accordingly, the findings of the court of appeals regarding the effectiveness of that Order must be resolved by the Court. The Court must first review the validity of the FERC order revoking Order No. 80. In turn, if the revocation of Order No. 80 is found invalid, the validity of Order No. 80 itself must be examined.

Order No. 80 poses the potential for substantial economic injury to gas suppliers and consumers. Those non-constituted questions regarding the effectiveness of Order No. 80 raised by PEG must, therefore, be resolved in the event this Court affirms the court of appeals in holding unconstitutional the legislative veto exercised in this case.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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May 21, 1982

Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

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THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GAS GROUP,
Appellants,

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CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, and PUBLIC CITIZEN, INC.,
Appellees.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA and UNITED DISTRIBUTION COMPANIES,
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PETROCHEMICAL ENERGY GROUP,
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CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
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AMERICAN GAS ASSOCIATION,
Appellant,

v.

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Appellees.

UNITED STATES SENATE,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

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CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
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APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

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September 3, 1982

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 2

A. Statement of Facts 2

B. The Decision Below 4

THIS COURT SHOULD LIMIT ITS REVIEW TO THE QUESTION OF THE CONSTITUTIONALITY OF THE VETO. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: Page

Buckley v. Valeo,
424 U.S. 1 (1976) 5

Champlin Refining Co. v. Corporation Comm'n.
286 U.S. 210 (1932) 5

Immigration and Naturalization Service v. Chadha,
(Nos. 80-1832, 80-2170, 80-2171) 8

Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency,
____ F.2d____ (No. 81-2068) (3d Cir., July 8, 1982) 9

United States Constitution:

Article I, Section 7 6

Statutes and Regulations:

Natural Gas Policy Act of 1978,
Pub. L. No. 95-621, 92 Stat. 3350 ..... *passim*

Section 202(a),15 U.S.C. § 3342(a) 2, 4

Section 202(c), 15 U.S.C. § 3342(c) 4, 8, 10

5 U.S.C. § 553 4

15 U.S.C. § 3416(a)(4) 2

28 U.S.C. § 1252 8

18 C.F.R. § 286.102 2

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APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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* *There are no parent companies, subsidiaries, or affiliates of any of the appellees-respondents.*

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

STATEMENT OF THE CASE

A. Statement of Facts

On May 6, 1980, the Federal Energy Regulatory Commission ("FERC" or the "Commission"), acting pursuant to section 202(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(a) (the "NGPA"), issued a regulation which is referred to as the Phase II incremental pricing rule. 5a. The purpose of the rule, which FERC was expressly required by statute to issue by May 9, 1980, was to shift some of the price increase resulting from the phased deregulation of natural gas from residential to industrial users. *Id.* On May 7, 1980, the Committee on Interstate and Foreign Commerce of the House of Representatives disapproved the rule, and on May 20, the House of Representatives, pursuant to section 202(c) of the NGPA, overwhelmingly voted to veto the rule to prevent it from going into effect. *Id.*

On June 5, 1980, acting pursuant to the requirements of 18 C.F.R. § 286.102 and 15 U.S.C. § 3416(a)(4), appellees-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (the "Consumer Groups") petitioned FERC for rehearing on the ground that the House's veto was unconstitutional and therefore of no effect. 197a. They requested that the Commission delete the portion of its May 6 order which made its effectiveness conditional upon the failure of either House of Congress to veto the rule. On

August 1, 1980, the Commission denied the petition. Although recognizing that significant constitutional questions were raised by the veto, it declined to take sides on the merits. 197a-198a. But instead of leaving the matter in that posture, so that the Consumer Groups could have plainly sought judicial review of the denial and obtained a ruling on the veto's constitutionality, the Commission purported to revoke the rule, allegedly in order to rid the public of some ill-defined uncertainty but, quite obviously, in an effort to prevent the Consumer Groups from challenging the legality of the veto in court. 199a-203a.

In response, the Consumer Groups sought rehearing of the portion of the order which purported to revoke the May 6 rule. 205a. On October 2, 1980, that second petition for rehearing was denied. 204a-207a. Petitions for review were filed in the United States Court of Appeals for the District of Columbia Circuit with respect to both the August 1 and October 2 denials, and they were ordered consolidated. 6a.

Intervention was granted various industry groups whose members would have had to pay increased prices for natural gas if the incremental pricing rule went into effect, and the intervenors have appealed the decision of the D.C. Circuit to this Court (Nos. 81-2008, 81-2020, 81-2151, and 81-2171). In the Court of Appeals, FERC limited its arguments to a defense of the revocation of the rule and to its claim that the veto was not severable from the remainder of the statute authorizing incremental pricing. 6a. It has not, however, filed for review in this Court. In addition, the Executive Branch, appearing through the Department of Justice, appeared as an *amicus curiae* below, supporting the constitutional challenge to the veto, and the Senate and House of Representatives filed an *amicus* brief both urging the court not to reach the veto question and

defending the veto on its merits. *Id.* After the decision was issued, all three governmental parties were granted leave to intervene, and the Senate and House have filed petitions for writs of certiorari (Nos. 82-177 and 82-209).

B. The Decision Below

No one disputes that the constitutionality of the veto of the Phase II incremental pricing rules presents a constitutional issue of great importance to the Executive Branch, the Congress, and the public. Nonetheless, all of the parties opposing the Consumer Groups in this action have made every effort to have the Court of Appeals and this Court avoid reaching it, with their principal focus on two arguments. First, they contend that, because of the Commission's August 1 revocation order, there is no incremental pricing rule that could go into effect even if the veto is held unconstitutional, and therefore the case is moot. Second, they argue that the provision containing the veto, section 202(c), is not severable from the provision authorizing the issuance of the Phase II rule itself, section 202(a), and thus, if the veto is unconstitutional, there is no authority to issue any rule, and hence the Consumer Groups could not benefit from a declaration that the veto is unconstitutional.[1]

The Court of Appeals in a unanimous opinion rejected both of these arguments. As to the revocation, it agreed with the Consumer Groups that FERC had violated the Administrative Procedure Act, 5 U.S.C. § 553, by failing

[1]In the Court of Appeals, the House and Senate argued that the court did not have jurisdiction, alleging that the constitutional challenge should have been brought in the District Court. That position was rejected by the court below, 17a-20a, and it has not been pursued in this Court. In addition, the Senate and House claimed that the case involved a political question, but the Court of Appeals also rejected that contention. 43a-50a.

to provide notice and an opportunity for public comment before revoking the Phase II rule. 31a-36a. In so ruling, the court found that the prior notice given with respect to the proposed incremental pricing rule was inadequate to cover the revocation, 32a-33a, and that the Commission lacked good cause for failing to provide for public comment. 35a-36a. Accordingly, it concluded that the revocation was void, and thus it did not have to reach the alternative argument made by the Consumer Groups that, due to the mandatory nature of the Phase II requirement imposed by section 202, FERC lacked the power to revoke the Phase II rule in its entirety. 31a.

The Commission also rejected the claim of nonseverability. Applying the test urged on it by all parties, as enunciated by this Court in *Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932), *quoted with approval in Buckley v. Valeo,* 424 U.S. 1, 108-109 (1976), 23a, the court found that if Congress had known that it could not have included a veto provision, it would still have required FERC to issue Phase II incremental pricing rules. 28a. The court did so based upon its detailed review of the legislative history of the NGPA and in particular the central role which both Houses assigned to incremental pricing as part of the compromise to reduce the price increases to residential users resulting from the NGPA's phased price deregulation. 24a-27a. By concluding that the veto was severable, the court avoided reaching the alternative argument made by the Consumer Groups that, if the veto were not severable, the incremental pricing authority was also not severable from phased deregulation. 21a-22a. In that event, the natural gas pricing laws would revert to what they were before the NGPA, which would mean greater price controls and hence lower prices for residential users.

On the merits, the Court of Appeals examined the debate surrounding the veto and found that the veto was predominantly legislative in character, since many members expressed the view in 1980 that they were simply taking a second look at what they did in 1978 and were using the veto to alter that prior policy determination. 79a-80a. The court found that, as a legislative act, the veto was unconstitutional because it did not comply with the lawmaking requirements of Article I, Section 7 of the Constitution, which mandate affirmative approval by two Houses of Congress and presentment to the President for either his signature or a veto. The court addressed at length the principal arguments advanced by the Congressional *amici* based on their expansive reading of the Necessary and Proper Clause of the Constitution – that the veto was similar to other actions properly taken by a single House, and that the rule sent to Congress was merely a proposal that, like any other Executive proposal which failed passage of both Houses, did not become law. As to the former, the court found that in some cases the actions were not similar to the veto and in others there was doubt as to the constitutionality of the actions relied on. 55a-64a. The court also rejected the characterization of the rule as a proposal and noted that Congress can act only through positive action, not by inaction. 74a-77a.

The court also examined the veto from a separation of powers perspective and found that it was unconstitutional under that analysis as well. 84a-103a. Thus, if the House were attempting to control, or share with FERC, the responsibility for administering the incremental pricing rules, it was acting unconstitutionally in performing an Executive function. 90a-99a. Similarly, if the House were interpreting the NGPA, and had concluded that the rule was not proper under it, it would have been overstepping its constitutional role by undertaking a function reserved

exclusively for the Judiciary. 100a-103a. Therefore, the Court concluded, regardless of whether the veto was seen as a Legislative, Executive or Judicial act, it was unconstitutional.[2]

Finally, the court turned to the question of relief. As the Consumer Groups recognized, the veto had deprived the industry parties, who would be adversely affected by the rule, of their opportunity to petition for rehearing or seek judicial review of the rule. In addition, the Consumer Groups acknowledged that, by the time the case is finally concluded, there may well be changed circumstances requiring a different rule from the one considered appropriate in 1980. Accordingly, they advised the court that they would not object if, upon remand, the Commission temporarily stayed the rule to allow for reconsideration in light of the then existing circumstances. In response, the Court of Appeals directed that its order invalidating the veto be stayed for 30 days after issuance of the mandate to permit the Commission to take whatever action it deemed appropriate at that time. 104a. As a result of subsequent orders of the Court of Appeals, and the filing of the jurisdictional statements and petitions for writs of certiorari in this Court, no further action has been taken by FERC, and the order below remains stayed.

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[2]Because of these rulings the Court of Appeals did not reach the alternative argument made by the Consumer Groups based on the doctrine of undue delegation. 37a & note 82.

THIS COURT SHOULD LIMIT ITS REVIEW TO THE QUESTION OF THE CONSTITUTIONALITY OF THE VETO.

The four jurisdictional statements and two petitions for writs of certiorari present twenty-five questions for review. Even taking into account the overlaps between them, there are at least ten different issues raised. In addition, there are also alternative grounds for the rulings on revocation and severability, which were raised by the Consumer Groups below, but not reached by the Court of Appeals.

Since the Court of Appeals found section 202(c) of the NGPA to be unconstitutional, the case is properly here on appeal pursuant to 28 U.S.C. § 1252, although for reasons unstated in their papers, the Senate and House of Representatives have filed petitions for writs of certiorari. In any event, the sole basis for the appeal, and the only question worthy of plenary consideration by this Court, is the constitutionality of section 202(c) and the ensuing veto. While the Consumer Groups believe that a decision on the constitutionality of the legislative veto which is at issue in *Immigration and Naturalization Service v. Chadha,* (Nos. 80-1832, 80-2170 and 80-2171), would be dispositive of the constitutional question presented here, since the Court has ordered reargument in *Chadha,* consideration of the constitutional question in this context may aid the Court in its resolution of the issue presented there. Therefore, since an appeal from the declaration of unconstitutionality is properly before this Court, we do not object to plenary review of that issue.[3]

[3]Counsel for the Consumer Groups here also represent Mr. Chadha in his case, and all of the other parties in *Chadha* are also represented by the same counsel here. The only additional parties in this case are the four groups of industry appellants, only two of whom – the Interstate Natural Gas Association of America/United Distribution Companies and the American Gas Association – have presented the constitutional question in their jurisdictional statements.

None of the myriad of other issues presented deserves this Court's consideration. Several of the issues, such as political question, standing, and severability, are fully presented in *Chadha*. Whatever rulings need to be made by the Court on those questions can be done in that case and then simply applied here. The other principal questions involve the interpretation of the Administrative Procedure Act and were correctly decided below. *See also Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency,* _____ F.2d_____, (No. 81-2068) (3d Cir., July 8, 1982). Moreover, they present no significant issues for the Court, as evidenced by the fact that the Commission has not asked for further review of them even though it was entitled to do so as of right. Finally, the problem of relief, which is the only real concern of the industry appellants, is adequately resolved by the opportunity that the Commission has to consider the matter further on remand.[4]

[4]Of the remaining issues raised in the various filings, several seem to be directed to the validity of the underlying Phase II rule (question 4 of the Interstate Natural Gas Association, question 5 of the American Gas Association, and question 3 of the Petrochemical Energy Group). These questions are not at issue in this case, nor were they raised below. Others are related to this case, but were not adequately presented below, and therefore should not be considered by this Court (questions 3 and 5 of the House of Representatives and question 1 of the American Gas Association).

CONCLUSION

For the foregoing reasons, this Court should grant plenary consideration limited solely to the question of the constitutionality of the legislative veto issued pursuant to section 202(c) of the Natural Gas Policy Act.

Respectfully submitted,

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Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

In the Supreme Court of the United States

OCTOBER TERM, 1982

PROCESS GAS CONSUMERS GROUP, ET AL., APPELLANTS
v.
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, ET AL., APPELLANTS
v.
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

PETROCHEMICAL ENERGY GROUP, APPELLANT
v.
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

AMERICAN GAS ASSOCIATION, APPELLANT
v.
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES SENATE, PETITIONER
v.
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER
v.
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

The United States will address the following question:

Whether Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3342(c), which authorizes one House of Congress to pass a resolution disapproving a rule adopted by the Federal Energy Regulatory Commission concerning the incremental pricing of natural gas, is unconstitutional because it contravenes the procedures established in Article I of the Constitution for the exercise of legislative power or because it violates the principle of separation of powers.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions	3
Statement	3
Discussion	12
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Buckley v. *Valeo*, 424 U.S. 1 ..... 11, 16, 17, 18
McLucas v. *DeChamplain*, 421 U.S. 21 21

Constitution, statutes and regulations:

United States Constitution:

Article I 3
Section 1 ..... 9, 13, 14
Section 7 ..... 9, 13, 14
Clause 2 13
Clause 3 13
Section 8 ..... 13, 14
Article II 3
Section 2, Clause 2 (Appointments Clause) 11
Section 3 16
Article III 3

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:

5 U.S.C. 551(5) 8
5 U.S.C. 553 6
5 U.S.C. 553(b)(B) 9
5 U.S.C. 553(c) 7

Constitution, statutes and regulations—Continued Page

Federal Trade Commission Improvements Act of 1980, Section 21(a), 15 U.S.C. (Supp. IV) 57a-1(a) 18
Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 15 U.S.C. (Supp. IV) 3311 *et seq.* 3
Section 201, 15 U.S.C. (Supp. IV) 3341 ..... 3, 4, 7
Section 202, 15 U.S.C. (Supp. IV) 3342 ....3, 4, 7, 20
Section 202(a), 15 U.S.C. (Supp. IV) 3342 (a) 4, 7, 8
Section 202(b), 15 U.S.C. (Supp. IV) 3342 (b) 7, 8
Section 202(c), 15 U.S.C. (Supp. IV) 3342 (c) 4, 6, 7, 8, 9, 20
Section 204(e), 15 U.S.C. (Supp. IV) 3344 (e) 5
Section 206(d), 15 U.S.C. (Supp. IV) 3346 (d) 3
Section 506, 15 U.S.C. (Supp. IV) 3416 ..... 3, 7
28 U.S.C. 1252 21
28 U.S.C. 1291 21
28 U.S.C. 2103 21
42 U.S.C. (Supp. IV) 7171(b) 13

Miscellaneous:

126 Cong. Rec.:

p. H3311 (daily ed. May 6, 1980) 5
pp. H3839-H3855 (daily ed. May 20, 1980) 5
p. H3855 (daily ed. May 20, 1980) 5

44 Fed. Reg. (1979):

p. 57726 5
p. 67170 5

H.R. Rep. No. 96-938, 96th Cong., 2d Sess. (1980).. 5
H.R. Res. 655, 96th Cong., 2d Sess. (1980) 5
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 21

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CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.S. App. 1a-104a)[1] is reported at 673 F.2d 425.

JURISDICTION

The jurisdiction of the court of appeals was invoked under 15 U.S.C. (Supp. IV) 3416(a)(4) (J.S. App. 17a-20a). The judgment of the court of appeals was entered on January 29, 1982 (J.S. App. 208a-209a). The order of the court of appeals granting the motions of the United States House of Representatives, the United States Senate, and the United States for leave to intervene was entered on March 2, 1982 (J.S. App. 105a). A petition for rehearing was denied on March 10, 1982 (J.S. App. 210a). The notices of appeal in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 were filed on March 15, 17,

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 81-2008.

25 and 26, 1982, respectively (J.S. App. 213a, 215a, 217a, 220a),[2] and the jurisdictional statements were filed on April 29 and May 1, 21 and 24, respectively. On May 26, 1982, the Chief Justice granted the House of Representatives and the Senate an extension of time, to and including August 7, 1982, within which to file a petition for a writ of certiorari. The petition in No. 82-177 was filed by the Senate on August 2, 1982, and the petition in No. 82-209 was filed by the House of Representatives on August 6, 1982. The jurisdiction of this Court in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 is invoked under 28 U.S.C. 1252, and the jurisdiction of this Court in Nos. 82-177 and 82-209 is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Pertinent provisions of Articles I, II and III of the United States Constitution are reproduced at J.S. App. 222a-224a.

2. Sections 201, 202, 206(d) and 506 of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3341, 3342, 3346(d) and 3416, are reproduced at J.S. App. 224a-231a.

STATEMENT

1. Title I of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, provides for the phased deregulation of natural gas prices. Title II provides for a system of incremental pricing to "eas[e] the transition to deregulation" (J.S. App. 7a). Incremental pricing is a mechanism for passing

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[2] The Federal Energy Regulatory Commission also filed a notice of appeal, on March 25, 1982 (J.S. App. 219a), but it did not thereafter file a jurisdictional statement.

through to certain industrial users some of the increased price for natural gas resulting from phased deregulation, up to a level established by the cost of alternative fuels. It was designed to protect residential consumers against higher prices resulting from deregulation and to furnish some restraint on the prices paid by pipelines for natural gas supplies, particularly after deregulation, because large industrial users were expected to be especially price sensitive (*id.* at 7a-8a).

Under Title II of the Act, the implementation of incremental pricing is to occur in two phases. Section 201 of the Act, 15 U.S.C. (Supp. IV) 3341, directs the Federal Energy Regulatory Commission (FERC), within 12 months of the enactment date of the Act, to prescribe a rule providing for incremental pricing for the boiler fuel use of natural gas by any industrial boiler fuel facility. To implement Phase II, Section 202(a) of the Act, 15 U.S.C. (Supp. IV) 3342(a), in turn directs the Commission to prescribe an amendment to the Phase I rule, extending the rule generally to other industrial users of natural gas, not later than 18 months after the enactment date of the Act.

Under Section 202(c) of the Act, 15 U.S.C. (Supp. IV) 3342(c), the Phase II rule adopted pursuant to Section 202 must be submitted to each House of Congress. Section 202(c) provides that, following submission, the amendment "shall take effect" at the end of 30 calendar days of continuous session of Congress "unless, during such 30 day period * * * either House of the Congress adopts a resolution of disapproval * * * with respect to such amendment."

2. As required by Section 201, the Commission published a rule in October 1979 applying incremental pricing to industrial boiler fuel facilities.

44 Fed. Reg. 57726. On November 15, 1979, the Commission published a notice of proposed rulemaking for a Phase II rule extending incremental pricing to all industrial users of natural gas not specifically exempted under the Act. 44 Fed. Reg. 67170. On May 6, 1980, the Commission issued final Phase II regulations based on the notice issued the previous November (J.S. App. 12a, 123a-195a).

On the same day that the Commission adopted the Phase II rule, a resolution of disapproval (H.R. Res. 655, 96th Cong., 2d Sess. (1980); J.S. App. 222a) was introduced in the House of Representatives and referred to the House Committee on Interstate and Foreign Commerce. See 126 Cong. Rec. H3311 (daily ed. May 6, 1980). The relevant Subcommittee approved the resolution by voice vote that same day, and the full Committee did likewise on May 7, 1980. See H.R. Rep. No. 96-938, 96th Cong., 2d Sess. 5 (1980). In its report to the full House, dated May 12, 1980, the Committee explained its position by noting that conditions in the energy market and in the economy had changed considerably since the Act was passed in 1978 and that there had not yet been sufficient experience with incremental pricing under Phase I (*id.* at 8-9, 13-14). The Committee also took issue with what it characterized as the Commission's narrow interpretation of its authority under Section 204(e) of the Act, 15 U.S.C. (Supp. IV) 3344(e), to establish the alternative fuel cost. H.R. Rep. No. 96-938, *supra*, at 10-11. Comments during floor debate on the resolution echoed the Committee report's main themes. See 126 Cong. Rec. H3839-H3855 (daily ed. May 20, 1980); J.S. App. 14a-15a. On May 20, 1980, the resolution of disapproval passed the House by a vote of 369 to 34 (*id.* at 15a; 126 Cong. Rec. H3855 (daily ed. May 20, 1980)).

3. a. After passage of the resolution of disapproval, appellee-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (collectively referred to herein as CECA) petitioned the Commission for rehearing. CECA sought an order making the Phase II rule effective, contending that the one-House veto provision in Section 202(c) of the Act is unconstitutional and that the resolution of disapproval passed by the House pursuant to that section therefore was of no legal effect (J.S. App. 15a).

By order dated August 1, 1980, the Commission denied the petition for rehearing and instead revoked the Phase II rule (J.S. App. 196a-203a). The Commission declined to pass upon the constitutionality of Section 202(c), stating that "sound administrative practice requires the presumption of constitutional validity of the statutes entrusted to this Commission for implementation" (J.S. App. 198a). The Commission noted, however, that an argument could be made that if the legislative veto provision in Section 202(c) were held invalid by a court, the Phase II rule would take effect. The Commission stated that it "ha[d] not yet independently evaluated whether the Phase II rule meets the social and economic goals of the Title II incremental pricing program" (J.S. App. 199a) and explained that it was revoking the rule to permit it to make such an evaluation (*ibid.*).

b. CECA petitioned for rehearing of the revocation order, asserting that the Commission had no substantive authority to revoke the Phase II rule and that, in any event, the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553, should have been followed (J.S. App. 16a). The Com-

mission denied the petition for rehearing by order dated October 2, 1980, concluding that Sections 201 and 202 of the Act empowered it to revoke the rule and that notice and comment requirements had been satisfied by the original notice of proposed rulemaking published on November 15, 1979 (J.S. App. 204a-207a). In the alternative, the Commission stated that there was "good cause" for dispensing with further notice and comment procedures (*id.* at 206a-207a, citing 5 U.S.C. 553(b)).

4. CECA then filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of the Commission's orders of August 1 and October 2, 1980 (J.S. App. 16a), again contending that Section 202(c) of the Act is unconstitutional. The United States Senate and House of Representatives appeared as amici curiae supporting the constitutionality of Section 202(c), and the United States appeared as amicus curiae arguing that the legislative veto provision is unconstitutional. FERC did not take a position on the constitutional question.

a. As an initial matter, the court disposed of a number of subsidiary issues raised by the House and Senate and by FERC:[3]

First, the court rejected the argument that it was unnecessary to decide the constitutional question because the legislative veto provision in Section 202(c) of the Act is not severable from the authorization in Section 202(a) and (b) for the promulgation of a

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[3] In addition to the issues discussed in the text, the court rejected the arguments that the court of appeals did not have statutory jurisdiction of the case under 15 U.S.C. (Supp. IV) 3416 (J.S. App. 17a-20a) and that the constitutionality of the legislative veto presents a non-justiciable political question (*id.* at 43a-49a).

Phase II rule and that petitioners therefore were not in any event entitled to effective relief (J.S. App. 21a-30a). The court concluded, after reviewing the legislative history, that Congress would have enacted Phase II of the incremental pricing mechanism without the legislative veto device and that Section 202(c) thus was severable from the statutory authorization in Section 202(a) and (b) for issuance of a Phase II rule (J.S. App. 24a-30a). The court noted in this regard that the legislative veto provision was not contained in the incremental pricing bills passed by either House. Instead, the court observed, the veto provision was added by the conference committee, which failed even to mention, much less emphasize, this feature in the portion of its report that summarized Title II of the Act. This history, the court explained, "militates against the view that the veto provision was essential to the incremental pricing and [Natural Gas Policy Act] compromises" (*id.* at 25a).

The court of appeals also held that the case was not moot by virtue of FERC's attempted revocation of the Phase II rule, finding that FERC had failed to provide the notice and opportunity for comment required by the APA in order for the revocation to become effective (J.S. App. 31a-34a). The court rejected the Commission's contention that the opportunity for notice and comment provided in connection with the initial promulgation of the Phase II rule was sufficient to cover the order of revocation because one of FERC's options at the outset was to adopt no Phase II rule at all. The court noted that the APA defines the term "rule making" to include the process for repeal as well as adoption of a rule (5 U.S.C. 551(5)) and reasoned that this definition would have been unnecessary if notice and comment prior to adoption of a rule were

sufficient to encompass later repeal. In addition, the court remarked that the issues involved in the revocation decision—the constitutionality of the legislative veto and the consequenecs that might follow from a judicial decision—were different from those raised in the initial rulemaking proceeding (J.S. App. 32a-34a).

The court of appeals rejected the contention that FERC had "good cause," within the meaning of 5 U.S.C. 553(b)(B), to dispense with notice and comment procedures. The court observed that FERC had merely asserted that notice and comment were "unnecessary," without stating its reasons in the revocation order itself, as explicitly required by 5 U.S.C. 553(b)(B), and held that in any event no emergency existed warranting FERC's decision not to afford the public an opportunity to participate (J.S. App. 35a-36a).

b. On the merits, the court of appeals held unconstitutional the legislative veto provision in Section 202(c) of the Act for two independent reasons. First, it held that the authorization for one House of Congress to adopt a resolution disapproving a rule promulgated pursuant to an Act of Congress violates the explicit requirements of Article I, Sections 1 and 7 of the Constitution, which the court described as establishing the "fundamental prerequisites to the enactment of federal laws" (J.S. App. 55a).

The court read the debates of the Constitutional Convention and the *Federalist* papers to reflect a concern on the part of the Framers to protect against improvident and encroaching action by the Legislative Branch and the possibility that majorities in the National Legislature might exercise unconstrained power that could destroy the power of the States. In the court's view, the Great Compromise, dividing the Con-

gress into two Branches, one representing the people and the other the States, served to guard against the latter eventuality, and the requirement of concurrent action by these two differently constituted bodies served as a check against the former (J.S. App. 70a-71a). Similarly, the court held that the provision for presentation of all legislative measures to the President for his approval or disapproval was intended by the Framers to be a "defensive weapon against legislative intrusions on the powers of the Executive" (*id.* at 64a) and a "check against ill-advised legislation" (*id.* at 65a). These important purposes underlying the procedural requirements for the exercise of power by the Legislative Branch required rejection of the suggestion that a legislative veto of agency action is exempt from those requirements.

The court "emphatically reject[ed]" the argument that the Phase II rule never had legal effect in the first place but rather was merely a "proposal" that could be rejected by one House of Congress without compliance with the bicameralism and presentation requirements. The court observed that the one-House veto "effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect" (J.S. App. 74a). The court noted that a rule which is not disapproved does not die, as does a bill that fails to pass both Houses of Congress; rather, such a rule has legal force as the product of a valid authorization conferred on an agency by an Act of Congress (*id.* at 74a-79a). To render invalid a rule issued pursuant to such authorization, the court concluded, requires adherence to the "same procedure" followed in conferring the authorization in the first place, that is, concurrence of both Houses of Congress and presentation to the President for approval or veto (*id.* at 80a). Con-

versely, the court stated that "[i]f Congress had wanted FERC merely to propose an extension of incremental pricing to be accepted or rejected by Congress, it could have so provided" (*id.* at 74a-75a).

The court of appeals also held that the legislative veto violates the constitutional doctrine of separation of powers (J.S. App. 84a-103a). The court noted that this Court held in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that the issuance of regulations represents the performance of a significant governmental duty pursuant to public law and therefore must be exercised by "Officers of the United States" appointed either by the President or as otherwise provided by the Appointments Clause (Article II, Section 2, Clause 2), not by officers appointed by Congress (J.S. App. 91a, quoting 424 U.S. at 140-141). In the court of appeals' view, it followed a fortiori from this holding that Congress itself likewise is prohibited from interfering in the rulemaking process, for "[i]t would be anomalous in the extreme to hold that Congress may not appoint the officials who make rules, but may enact a mechanism permitting effective congressional control over these officials' decisions" (J.S. App. 92a-93a).

The court rejected the suggestion that the Commission's status as an "independent agency" alters the separation of powers analysis (J.S. App. 88a-90a). The court noted that the status of the Federal Election Commission as an independent agency did not prevent this Court in *Buckley* from employing the separation of powers doctrine as the basis for reviewing the constitutionality of the statute establishing the Commission. The court recognized that the President "does not have a claim to control the decisionmaking of independent agencies" (*id.* at 89a). But the court found it to be "an enormous, and unwarranted, jump from this to the conclusion that Congress may itself

interfere with an independent agency's decisions without regard to separation of powers. Although FERC is substantially independent of the Executive, it nonetheless performs executive functions" (*ibid.*).

c. In view of its decision on the merits, and its holding that FERC had not validly revoked the rule, the court of appeals concluded that the rule should go into effect. However, the court granted a stay of the effective date to permit the Commission an opportunity to reconsider the rule (J.S. App. 104a). After the court entered its judgment, the Senate, House of Representatives, and the United States were granted leave to intervene (*id.* at 105a).

DISCUSSION

Like the Ninth Circuit in *INS* v. *Chadha*, No. 80-1832, the court of appeals in this case has held unconstitutional a provision in an Act of Congress authorizing one House of Congress to adopt a resolution, without the concurrence of the other House or presentation to the President, that nullifies an order issued by a federal agency pursuant to its statutory mandate. The constitutionality of the legislative veto device presents an issue of the most fundamental nature regarding the distribution of powers among the coordinate branches of the federal government and the manner in which those powers may be exercised. That issue manifestly warrants, and already has been granted, plenary review by this Court. *INS* v. *Chadha* was fully briefed and argued last Term, and it has been set for reargument this Term. The same constitutional principles that govern *Chadha* govern this case as well, and the Court's decision in *Chadha* will, we believe, control here.

To be sure, this case involves a legislative veto of a rule, not an order entered at the completion of an

adjudicatory process, as in *Chadha*. In addition, the Officers of the United States responsible for promulgation of the rule in this case—the members of the Federal Energy Regulatory Commission—may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office (42 U.S.C. (Supp. IV) 7171(b)); they are not subject to removal by the President at will, as is the Attorney General, whose order of deportation was the subject of the legislative veto involved in *Chadha*. But neither of these differences between the two cases has any bearing on the resolution of the constitutional issue.

1.a. As we have explained in our Brief in *Chadha* (at 17-43), the explicit procedural requirements of bicameral action and presentation to the President set forth in Article I, Section 7 of the Constitution apply in all instances in which Congress seeks to exercise its legislative powers and thereby affect the legal rights and duties of persons outside the Legislative Branch. With respect to the requirement of bicameralism, this is clear from Article I, Section 1, which vests "*All* legislative Powers" jointly in the Senate and House of Representatives, and from Article I, Section 8, which provides that "The Congress," not either of its Houses standing alone, shall have the enumerated powers. With respect to the requirement of presentation to the President, Clause 2 of Article I, Section 7 makes clear that "*Every* Bill which shall have passed the House of Representatives and the Senate" must be presented to the President (emphasis added). And if there were any doubt, Clause 3 of the same section provides that "*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" (emphasis added)—*i.e.*, all resolutions and votes constituting the exercise of the legislative powers conferred by

Article I, Sections 1 and 8—must be presented to the President, even if not actually in the form of a bill.

In view of the explicit and all-embracing constitutional text, the requirements of bicameralism and presentation to the President apply whether the conduct that is the subject of the congressional action is that of the President himself, subordinate officials in the Executive Branch subject to his control, the members of an "independent agency" who may be removed by the President only for cause, or members of the Judiciary, who are entirely independent of the President. These procedural requirements also must be followed whenever the legislative action will have a legal impact on private parties, as the resolution of disapproval in this case plainly did: absent the legislative veto, the Phase II rule issued by FERC pursuant to public law would have gone into effect and altered the prices consumers paid for natural gas. Moreover, just as the explicit text of Article I, Section 7 requires bicameral action and presentation to the President in the case of public laws of general applicability as well as private laws affording relief or benefits to an individual person, so too that text forecloses a legislative veto of agency action that does not comport with the constitutional requirements, irrespective of whether the veto disapproves an order adopting a rule affecting the public at large, as in this case, or an order entered at the conclusion of an adjudicatory proceeding that affords relief or benefits to an individual person, as in *Chadha*.

b. The intent of the Framers underlying the pertinent constitutional provisions no more permits any distinction to be drawn between *Chadha* and this case than does the text of the Constitution itself. The requirements of bicameral action and presentation to

the President were intended to serve as formidable checks against improvident action by the Legislative Branch by ensuring an opportunity for due deliberation by the two differently constituted Houses and an independent review by the President. See our Brief in *Chadha*, at 28-31. In this case, the court of appeals found that a principal reason for the passage of the resolution of disapproval was the dissatisfaction of many Members of the House of Representatives with the statutory policy of incremental pricing embodied in the Natural Gas Policy Act of 1978, in light of changed circumstances, and their view that this statutory policy should be abandoned or its implementation delayed. See J.S. App. 13a-15a, 79a-80a. As the court below observed, such alteration of policy embodied in a previously enacted law "is precisely the kind of decision that the Constitution envisions will be made only by both houses with the participation of the President through his veto power" (*id.* at 80a).

The requirements of bicameralism and presentation to the President also were intended to prevent an aggrandizement of the Legislative Branch at the expense of the other two Branches, and the Presidential veto power therefore also serves in part as a defensive weapon by which the President may protect against encroachment by the Legislative Branch. See our Brief in *Chadha*, at 27-28, 29-30. A legislative veto of an order issued by an independent agency does not nullify a specific action that was subject to the President's control. But this hardly renders the Presidential veto power superfluous, even to the extent it is viewed as a means of defense against aggrandizement and encroachment by the Legislative Branch.

Members of an independent agency such as FERC, no less than members of the Cabinet subject to Presi-

dential direction, are Officers of the United States appointed by the President and responsible for the administration of public laws. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 140-141. The President's broad constitutional obligation to "take Care that the Laws be faithfully executed" (Article II, Section 3)—even if he cannot actually direct the *manner* of their execution in a particular instance—therefore requires preservation of the President's veto power within the system of checks and balances fashioned by the Framers as a defensive mechanism to protect against encroachment by the Legislative Branch upon the administration of the laws even by independent agencies. Indeed, precisely because the day-to-day administration of the laws by an independent agency is not subject to Presidential control, it is critical that the President's veto power be preserved undiminished to enable him at least to exercise the detached review of legislative measures the Framers intended when Congress, or one of its Houses, seeks to alter the manner in which such an agency carries out its statutory mandate.[4]

Moreover, if the check of the Presidential veto power could be readily circumvented by Congress merely by vesting authority to administer the laws in an independent agency not subject to the President's direct control, Congress could be expected to pursue that course, thereby further encroaching upon the President's administration of the laws generally and his responsibility to review legislative measures intended to alter the manner in which the laws are

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[4] The Presidential veto power also may serve to prevent aggrandizement of the Legislative Branch at the expense of the Judiciary, which likewise is independent of Presidential control.

carried out. Thus, recognition of a power in Congress or one of its Houses to exercise a veto over the action of an independent agency in enforcing the laws, without presentation of the measure to the President, could substantially diminish the stature of the President in the tripartite system of government embodied in the Constitution. Such a result would quite directly implicate the self-defensive purposes of the Presidential veto power.

2.a. For reasons similar to those just discussed, the fact that the instant case involves rulemaking and an independent agency does not affect the second ground on which legislative veto devices are unconstitutional: their incompatability with the doctrine of separation of powers. The Court held in *Buckley* v. *Valeo* that the performance of any significant governmental duty pursuant to a public law must be performed by Officers of the United States appointed by the President or otherwise in accordance with the Appointments Clause; those duties may not be performed by officials appointed by Congress. As we explain in our Brief in *Chadha* (at 48-50), it follows a fortiori from *Buckley* that if Congress cannot appoint those who will administer the law, it cannot take the more extreme step of actually reserving to itself the ultimate determination of how the laws will be administered. And because the Court's opinion in *Buckley* explicitly applies to rulemaking (424 U.S. at 140), the doctrine of separation of powers invoked in *Buckley* likewise bars a legislative veto of agency rulemaking.

b. The conclusion that the legislative veto violates the doctrine of separation of powers is not altered by the fact that the members of FERC may be removed by the President only for cause. As the court

of appeals observed (J.S. App. 88a-89a), this Court in *Buckley* applied the doctrine and its particular manifestation in the Appointments Clause in the context of the Federal Election Commission, which also is an independent agency. It is true that the President does not have the degree of control over the decisionmaking of independent agencies that he does with respect to actions of Officers of the United States who are subject to his removal at will. But as the court below observed, "it is an enormous, and unwarranted, jump from this to the conclusion that Congress may itself interfere with an independent agency's decisions without regard to separation of powers" (J.S. App. 89a). If Congress reserves to itself or one of its Houses the authority to veto orders issued by an independent agency, it possesses the power both to make the law and participate in its execution—the very concentration of powers in the Legislative Branch that the Framers intended to foreclose.

3. The Constitution thus furnishes no basis for distinguishing this case from *Chadha* with regard to the validity of the legislative veto. Indeed, the Senate and House of Representatives do not argue that the two cases are constitutionally distinguishable. At the same time, we fully appreciate that the fundamental importance of the constitutional issue presented may lead the Court to conclude that it should have before it the experience with a second legislative veto in order to assure that all aspects of the issue have been addressed.[5]

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[5] A constitutional challenge to the two-House legislative veto provision in Section 21(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. IV) 57a-1(a), is now pending be-

4. In any event, whatever considerations might warrant plenary review in this case of the constitutionality of the legislative veto device plainly do not extend to the various subsidiary issues on which a number of parties also have sought review. A proliferation of such issues would detract from the Court's and the parties' consideration of the fundamental constitutional question.

Thus, for example, the question whether FERC was required to comply with the notice and comment requirements of the APA when it revoked the Phase II rule is not one of general importance, and FERC itself has not sought review on that issue. The court of appeals made clear that FERC could reconsider the wisdom of the rule in proceedings on remand (J.S. App. 104a).[6] This Court's refusal to consider the validity of FERC's revocation therefore would not result in the imposition of a Phase II rule that has not received appropriate scrutiny by the agency in light of changed circumstances.

Similarly, the questions of standing, political question, and adverseness of parties presented by the House (82-209 Pet. I (Questions 4, 5 and 6), 22-23,[7] are essentially identical to those presented by the House in its brief in *Chadha* and need not be re-

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fore the United States Court of Appeals for the District of Columbia Circuit in a case involving a veto of the FTC's rule concerning deceptive commercial practices in sales of used cars. *Consumers Union of the United States* v. *Federal Trade Commission*, No. 82-1737. That case is scheduled for argument on October 12, 1982.

[6] FERC has not yet taken action on remand in light of the appeals and certiorari petitions filed in this case.

[7] See also 81-2171 J.S. I (Question 1), 13-17).

hearsed here. By the same token, the questions regarding the scope of FERC's rulemaking discretion under Phase II and whether that discretion reflects an undue delegation of authority by Congress (81-2008 J.S. 13-14; 81-2020 J.S. I (Question 4), 25-27) were adverted to only briefly by the court of appeals (J.S. App. 78a n.172), which found that Congress had in fact made a policy judgment in favor of incremental pricing (*id.* at 79a). In any event, consideration of this issue would be premature in the context of the Phase II rule: that rule will not go into effect if the legislative veto is constitutional, and the rule will be the subject of further proceedings before FERC if the veto is unconstitutional and severable, as the court below held.

CONCLUSION

If the Court concludes that consideration of the constitutionality of the legislative veto in *Chadha* would be assisted by having this case before it as well, the Court should note probable jurisdiction in Nos. 81-2020 and 81-2171, which present the constitutional question. In that event, the Court also should grant the certiorari petitions filed by the House and Senate in Nos. 82-177 and 82-209, limited to the questions whether Section 202(c) of the Natural Gas Policy Act is unconstitutional and, if so, whether Subsection (c) is severable from the remainder of Section 202. The Court should limit the briefing in Nos. 81-2020 and 81-2171 to these issues as well. The appeals in Nos. 81-2008 and 81-2151 should be dismissed because they do not seek review of that aspect of the court of appeals' decision holding Section 202(c) of the Natural Gas Policy Act unconstitutional, which would appear to be a require-

ment for invoking the jurisdiction of this Court under 28 U.S.C. 1252.[a]

Respectfully submitted.

REX E. LEE
Solicitor General

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[a] The first paragraph of Section 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional * * *." This language would appear to link the right of appeal to the holding of unconstitutionality by the lower court. See also *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). Where an appeal pursuant to the first paragraph of Section 1252 has been taken, the second paragraph of Section 1252 provides that all other appeals or cross-appeals in the case shall be taken to the Supreme Court. It is this paragraph that would seem to apply to non-constitutional issues. Cf. R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). When a district court disposes of a non-constitutional issue, appeal ordinarily would be to the court of appeals pursuant to 28 U.S.C. 1291; it presumably is such appeals of right that the second paragraph contemplates will be taken instead to the Supreme Court. There is no independent right of appeal to this Court from a decision of a court of appeals on a non-constitutional issue, and the second paragraph of Section 1252 does not confer such a right merely because some other party has filed an appeal with respect to the constitutional issue. We have addressed a close variant of this question of statutory construction in our Motion to Dismiss in *Beneficial Finance of Kansas, Inc.* v. *United States*, No. 81-583 (filed Nov. 25, 1981).

Treating these jurisdictional statements as petitions for a writ of certiorari (see 28 U.S.C. 2103), the petitions should be denied, because they raise no issue of general importance warranting this Court's discretionary review.

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